RUSSELL TRIAL
AND
LABOR'S RIGHTS

OPINION

By W. H. TRUEMAN, K.C.

Examination and Statement of Law and Review of Mr. Justice Metcalfe's Charge to Jury, in Trial of R. B. Russell at Winnipeg, December, 1919

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Matters affecting organized labor having been involved in the Russell case, an opinion is asked by the representatives of labor as to the effect in law thereon of statements in the charge of Mr. Justice Metcalfe and the findings of the jury made under his direction. There may be an impropriety in my expressing an opinion while an appeal in that case is under consideration and while the trial of others indicted with him for the offence upon which he has been found guilty is pending. Indeed, I would consider the impropriety very grave if I made any statement which becoming public could be said to cause prejudice to the interest of either the Crown or the accused. I may be relieved from this imputation by pointing out that my views have nothing whatever to do with any other matter than the question of law raised by the strike issue in the case.

A large part of His Lordship's charge is devoted to a consideration of the criminal law in its relation to strikes. Much of that law is well known and well understood. Other phases of it are obscure and little known. His Lordship's statement of it, coupled with the verdict of the jury, which ordinarily would be assumed to have been applied to the facts before them, has given rise to the apprehension that the rights of labor either in calling a strike or during its continuance are of a very limited nature, and much more restricted than they were considered to be. While the evidence in the case is not before me, I think the facts as known by me warrant the conclusion that evidence was put in by the defence seeking to establish that the strike was called for the purpose of upholding the demand of the men employed in the metal trades that their employers should accept the principle known as collective bargaining. This evidence was material in order to meet to whatever extent it

would avail the case of the Crown that the strike was a common nuisance as charged in the seventh count as well as in furtherance of a seditious conspiracy. The findings of the Jury under a proper direction by the learned Judge would dispose of the issue raised by the seventh count one way or the other. Unfortunately His Lordship did not see fit or did not deem it necessary to analyse and weigh the evidence of the defence in this particular in his charge to the jury. In a case less involved and complicated in its mass of facts and the law bearing thereon, the verdict of a Jury could be deemed to be a pronouncement upon all the facts in issue. The Russell case was of a quite different class, and before one could properly assume that the Jury had pronounced upon the defence that the strike was for a trade purpose, the charge should properly have addressed the mind of the Jury to it. Indeed, with all respect, it was absolutely necessary that this should have been done, in view of the emphasis placed by His Lordship upon the evidence of the Crown that the strike was revolutionary in its object. I am bound to say that the charge is based upon a complete conviction of Russell's guilt. Whether that is well founded or not I am not called upon to consider. It must, however, weigh with me in determining whether the charge and the findings of the Jury made thereunder, have had the effect of establishing that a general or sympathetic strike is unlawful. This issue is distinctly raised in the seventh count of the indictment, in which the strike is made the exclusive basis for the charge that the accused committed a common nuisance within Sections 221 and 222 of the Criminal Code. Were the case presented by the Crown confined to the first six counts in which seditious conspiracy is charged, and the strike is referred to as an act in furtherance of it, the issue of seditious conspiracy rather than the question of the criminality of a sympathetic strike, would alone be disposed of by the verdict. The jury have found the accused guilty under the seventh as well as the other counts. If the issue raised by the seventh count and the defence thereto have not been properly left to the Jury, it can not be considered that the finding of the Jury upon it has any legal effect except so far as Mr. Russell is concerned.

His Lordship in dealing with the seventh count used the following language:—"It never was the intention to limit strikers so that they could not carry on such things as

were reasonably necessary. But, gentlemen, is it reasonably necessary to inconvenience the whole community? Is it necessary to call off the bread, to call off the milk, to shut off the water, threaten to shut off the water and all those things. Surely it cannot be contended for a moment that such conditions are within the limits of exemptions from punishments prescribed by the Code. A strike on these lines may become a common nuisance." The question is, was this proper direction? It is adverse to the lawfulness of a sympathetic strike. There is an opposing view that such a strike may be lawful. It may be that a sympathetic strike is lawful if its origin is for a lawful purpose, and the means employed in carrying it on are lawful even though inconvenience, hardship and loss are inflicted upon the public. The general principle is that a strike is not unlawful if its purpose is to advance the interests of the strikers and not to injure others, though in carrying it on injury is occasioned to others. Does this principle apply to sympathetic strikes or does the very nature of a sympathetic strike place it outside the class of lawful strikes? If in law it is not unlawful, but its legality depends upon the facts surrounding it, it would be for a Jury to find under the Judge's instructions upon the law whether the strike was for the purpose of benefiting the men or for an unlawful purpose, such as causing harm to others, or as in the Russell case, for a seditious purpose. The issue in this form was not submitted by the learned Judge to the Jury. Was it necessary that he should have done so, not for the purpose of a fair trial, a matter with which I have nothing to do, but in order that the Jury's finding should have value in determining whether a sympathetic strike is unlawful under the circumstances disclosed in the case?

At common law it is lawful and not criminal for persons to combine in order to bring about an increase in wages. This is the opinion of Mr. Justice Wright expressed in his standard work on Conspiracies (p. 51) after a close study of all the cases bearing on conspiracy, and is adopted by Sir James Stephen in his History of the Criminal Law of England (Vol. III., pp. 209 and 223). The contrary view was held by Sir William Erle (Trade Unions, p. 57). In 1851 the case of R. v. Rowlands, 5 Cox C.C. 460, was tried before Sir William Erle. The leaders of a trade union in London, who had no immediate personal interest in the matter, insisted that an employer at Wolverhampton should pay his

men a certain rate of wages, and, in order to compel him to do so, prevailed on his men to leave his employ until he did so and prevailed on others not to enter his employment. Mr. Justice Erle held this to be an indictable conspiracy. Workmen may, he said, if they think proper, combine together "for their own protection, and to obtain such wages as they choose to agree to demand, but "a combination for the "purpose of injuring another is a combination of a different nature directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another." He went on to say, "If you should be of opinion that a combination existed for the purpose of obstructing the prosecutors in carrying on their business, and forcing them to consent to the book of prices, and in pursuance of that consent they persuaded the free men and gave money to the free men to leave the employ of the prosecutors, the purpose being to obstruct them in the manufacture and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, that would be a violation of the law." In this view, at common law all combinations of workmen to affect the rates of wages are illegal and a strike is a criminal conspiracy. Sir James Stephen says that the result of this view of the law was to render illegal all the steps usually taken by workmen to make a strike effective. "A bare agreement not to work except upon specified terms was, so long as this view of the law prevailed, all that the law permitted to workmen. If a single step was taken to dissuade systematically other persons from working, those who took it incurred the risk of being held to conspire to injure the employer or to conspire to obstruct him in the conduct of his business. It is difficult to see how, in the case of conflict of interests, it is possible to separate the two objects of benefiting yourself and injuring your antagonist. Every strike is an act of war. Gain on one side implies loss on the other, and to say that it is lawful to combine to protect your own interests, but unlawful to combine to injure your antagonist, is taking away with one hand a right given with the other."

The question dealt with in **R. v. Rowlands** was raised five years later in **Hilton v. Eckersley**, 6 E. & B. 47, though it was unnecessary on the facts to decide it. Crompton J.,

held that a combination of workmen to maintain their wages was indictable "as tending directly to impede and interfere with the free course of trade and manufacture." Lord Campbell, C. J., thought otherwise. "I cannot bring myself to believe without authority much more cogent (referring to a dictum of Grose, J., **in R. v. Mawbey**, 6 T.R., 619, relied on by Crompton, J.) that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanour, and liable to be punished by fine and imprisonment." The third member of the Court, Sir William Erle, put his judgment on another ground. When the case went on appeal to the Court of Exchequer Chamber, consisting of six Judges, no opinion was expressed as to the question whether or not the agreement of the workmen was an indictable conspiracy.

Though the view of Sir William Erle had much to do with the enactment in 1871 by the British Parliament of two Acts, namely 34 and 35 Vict. C. 31, "An Act to amend the law relating to trade unions," and 34 & 35 Vict. C. 32, "An Act to amend the criminal law relating to violence, threats and molestation," the contrary view reached by Mr. Justice Wright and Sir James Stephen is now accepted as incontestably right. The matter is decisively dealt with by Lord Justice Fletcher Moulton in Gozney v. Bristol Trade and Provident Society (1909) 1 K.B. 901. He says:—"But the real fallacy of the argument on the part of the Defendant lies deeper. It proceeds on the proposition that strikes are per se illegal or unlawful by the law of England. In my opinion there is no foundation for such a proposition. It is true that occasional dicta are to be found to the effect that combinations to better the conditions of labor are unlawful at common law, but the Courts have never accepted the law they laid down, and eminent Judges have expressed views to the contrary. There is no trace of any such doctrine during the centuries when the common law of England was formed, nor in fact until the end of the eighteenth century. If we except an obiter dictum by Grose, J., in **Rex v. Mawbey** (1769), 6 T.R. 619, (which to my mind was not intended to refer to the common law, but to the effect of Statutes then in force), I cannot find that there were any Judicial dicta until after the Act of 1825." He then refers

to the Judicial error that I have already referred to that grew up after that year, and finds that the weight of authority is against it, "Strikes per se are combinations neither for accomplishing an unlawful end nor for accomplishing a lawful end by unlawful means." In those last words he holds that a strike in itself is not an indictable conspiracy at common law.

In 1867, Lord Bramwell, in Reg. v. Druitt, 10 Cox C.C. 592, laid down views that if effect had been given to them would have quite prohibited combinations founded on a surrender of personal liberty to bring about concerted action by men to better their conditions. This view was severely criticised at the time and has since been strongly condemned. In Mogul Steamship Co. v. McGregor (1892) A.C. 47, Lord Bramwell, who always smarted under the criticism, took the position that he had always said that a combination of workmen, an agreement among them to cease work for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable inter se, but not indictable. It is not often given to a Judge to repudiate in this downright manner views uttered thirty-five years previously. In Gibson v. Lawson (1891) 2 Q.B. 545, the Court of Appeal lay it down as unquestionable that a strike of workmen to benefit themselves, the effect of which is to injure an employer, is not illegal and indictable at common law.

Mr. Justice Metcalfe questions the authority of this case. I would not gather that he questions the soundness of the above statement in it. His Lordship appears to consider that the case itself is at variance with judgments delivered in **Quinn v. Leathem (1901) A.C.**, and particularly with expressions of opinion by Lord Brampton in that case. Lord Brampton at p. 528, makes the following observations: "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or an actionable conspiracy are in my opinion the same,

though to sustain an action damages must be proved." The statement is in complete agreement with the view expressed in Gibson v. Lawson. Mr. Justice Metcalfe considers that Archbold (Criminal Pleading, ed. 1918, p. 1355) has followed Lord Brampton and rejected the authority of Gibson v. Lawson because Lord Brampton is cited for the statement that notwithstanding the Conspiracy and Protection of Property Act, 1875, a combination of two or more without justification or excuse to injure a man in his trade is indictable. Lord Coleridge in Gibson v. Lawson did not set up such a view. The House of Lords has come pretty near to taking a different position. In Mogul Steamship Co. v. McGregor (1892) A.C. 25, it held that if persons pursuing a lawful object with lawful means do damage to an outside person there is no civil liability, even though they act from a bad motive. Quinn v. Leathem (1901) A.C. 495, and Scottish Co-Operative Society v. Glasgow Fleshers Ass. (1898) 35 Sc. L.R. 645, are authorities for the same position. Contra, if unlawful means, for example, intimidation, are used. See per Lord Lindley in Quinn v. Leathem, at p. 542. In Allen v. Flood (1898) A.C. 1, the threat of a strike in order to secure protection from encroachment by others on a particular class of labor in which the persons combining were directly and exclusively interested was conceded by Respondents' Counsel to be lawful. The case of Jose v. Metallic Roofing Co. (1908) A.C. 514, on appeal from the Ontario Courts to the Judicial Committee of the Privy Council is in point. It was alleged in the action that the Appellants (Officers of a Union) had conspired to injure the Plaintiffs in the conduct of their business, and that in pursuance of the conspiracy the union whom appellants represented caused the Plaintiffs' men to go out on strike. The trial Judge directed the Jury that if the resolutions of the Union calling out the men were the cause of the strike an actionable wrong had been committed, without regard to the motive and without regard to the conspiracy alleged. Counsel for the appellants argued that the real object of the strike was to advance the legitimate interests of the men, and that any injury sustained by the employers was strictly limited to that object. The Judicial Committee held that the direction could not be supported.

The basis of the law in both criminal and civil conspiracy is the same. This is pointed out by Lord Brampton in the extract from his judgment quoted above. There

can be no doubt that if the law of criminal conspiracy in relation to combinations of workmen and strikes had received the same close examination that was given to civil conspiracy by modern jurists the reactionary and unsound views of Sir William Erle, expressed in R. v. Rowlands and in his work on Trade Unions, and laid down in other judicial dicta would in due time have been rejected, and the law would not have needed the rectification it received by the Labor Acts of 1871. There is a passage in the address of Mr. Justice Metcalfe, taken from Sir James Stephen's work, that should be looked at closely, if a misleading view of the common law is to be avoided. It is a summary of the English law as to offences relating to trade and labor. "First there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labor, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the Statute law is put upon an entirely new basis, and all the old Statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law and carrying it so far as to say that any agreement between two people to compel any one to do anything he does not like is an indictable conspiracy independently of Statute. In 1871 the old doctrine as to agreements in restraint of trade being criminal conspiracies is repealed by Statute. But the Common Law expands as the Statute Law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the Act of 1871. (He is here referring to the Gas-Stokers case arising from their strike in 1872). Thereupon the Act of 1875 specifically protects all combinations in contemplation or furtherance of trade disputes, and with respect to such questions at least, provides positively that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal if done by a single person."

To understand this passage it is necessary to refer to the two Acts that were passed in 1871. One of these Acts (34 & 35 Vict. C. 31) was passed to secure freedom to work-

men to enter into agreements among themselves with the object of raising wages which otherwise would have been deemed unlawful according to the view of Sir William Erle as conspiracies in restraint of trade. The first of the above Acts is entitled "An Act to amend the law relating to trade unions." In Section 2 it enacts that the purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." One can see that the purpose of the Act was to give Unions the protection of the Common Law in respect to criminal conspiracy, withheld from them under the doctrine of restraint of trade applied to their agreements. See Conway v. Wade (1908) 2 K.B. 853, where Farwell, L. J., says: "The freedom of the individual workman to make the best terms that he could for himself was until 1871, curtailed by the application of the doctrine of public policy which treated combinations of workmen with the object of raising wages as conspiracies in restraint of trade, but the impediment was removed by the Legislature in that year." There may still be an unlawful conspiracy in restraint of trade. But the existence of conspiracy must be established as a fact. As the law stood under the dicta of Sir William Erle the very fact that the combination was to raise wages made the combination illegal and criminal. The other Act passed in 1871, namely 34 & 35 Vict. C. 32, "An Act to amend the criminal law relating to violence, threats and molestation," was complementary in one of its provisions to the provisions in S. 2 of the Trade Union Act. By this provision (S. 2) it is enacted that no one should be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless it comes within the prohibited acts defined in the Act. These are acts such as personal violence, and molestation and intimidation done with a view to coerce another for trade purposes (defined in S. 1). It is my submission that the enactment of this measure was not necessary to make strikes lawful at Common Law. It aimed to get rid of the doctrine that a strike could be punished as a conspiracy in restraint of trade. Of this doctrine, Sir James Stephen says (p. 209), "No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at Common Law before the year 1825." The need of the Statute followed as

a result of the views of Sir William Erle and certain judicial dicta, which in the opinion of Mr. Justice Wright and Sir James Stephen have no support in authority.

The Statutes came up for consideration by the Courts almost immediately after their enactment, in Reg. v. Bunn 12 Cox C.C. 316. In 1872 certain gas-stokers struck in London, the result of which was that a great part of London was for a time involved in complete darkness. They were indicted for a conspiracy to coerce or molest their employers in carrying on their business, and it was held that this was on two grounds an indictable conspiracy, though no offence was committed under the Act last mentioned. The first ground was that it was an indictable conspiracy to force the Company to carry on their business contrary to their own will by an improper threat or molestation. "It seems," says Sir James Stephen, referring to the case "that the great public inconvenience which such a strike would cause, and the nature of the employers' known engagements, might cause a threat to strike suddenly to be an improper molestation. Also a threat of a simultaneous breach of contract was regarded or was pointed out to the jury as conduct which they had a right to regard as a conspiracy to prevent the employer from carrying on his business." Upon this second charge the Defendants were convicted. This was fifty years ago. Would a London jury convict in a similar case today? One knows that it would not, even though the circumstances bring the case within part of the exceptions contained in the Conspiracy and Protection of Property Act, 1875, hereinafter referred to. Sir James Stephen says that this case substantially decided, as far as its authority went, that although a strike could no longer be punished as a conspiracy in restraint of trade, it might under circumstances, be of such a nature as to amount to a conspiracy at Common Law to molest, injure or impoverish an individual, or to prevent him from carrying on his business. The passage in Mr. Justice Metcalfe's address taken from Sir James Stephen's work, "But the Common Law expands as the statute law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the Act of 1871," is clearly referable to the Gas-Stokers' case. The Statute of 1872 narrowed the criminal responsibility of workmen in connection with strikes; the Common Law was not affected, and its elasticity was found sufficient to embrace acts which

it was thought were excluded from its operation by the Statute. The decision in the case caused great dissatisfaction amongst workmen, and was perhaps the principal occasion of the repeal of the Act of 1871 (C. 34 & 35 Vict., C. 32), and the enactment in its place of "the Conspiracy and Protection of Property Act, 1875," 38 & 39 Vict. C. 86. See Stephen, p. 225. This Act provides, first that "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committeed by one person would not be punishable as a crime." This change in the law does not affect any conspiracy for which punishment is awarded by Statute, or the law as to riot, unlawful assembly, breach of the peace or sedition, or any offence against the State or Sovereign. See S. 2, paragraphs 2 & 3. The Act also provides that wilful and malicious breach of a contract of service or hiring, with knowledge that to do so will probably endanger life, or cause serious bodily injury, or expose valuable property, real or personal, to destruction or serious harm, is summarily punishable (See S. 5); and that wilful and malicious breach of contract by employees of authorities supplying gas or water is similarly punishable if the employees know, or have reasonable cause to believe, that it will deprive the consumers wholly or in part of their supply (S. 4). Section 7 of the Act is important. It provides as follows:—(7) "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority:—

1. Uses violence to or intimidates such other person, or his wife or children, or injures his property; or,

2. Persistently follows such other person about from place to place; or,

3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, or,

4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or,

5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof, etc.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

By the Trade Disputes Act, 1906, S. 2, it is enacted that "it shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." By sub. s. 2 the words of S. 7 of the Act of 1875 beginning "attending at or near" are repealed.

The Act of 1875, in the words of Lord Cairns, was framed on the principle that "the offences in relation to trade disputes should be thoroughly known and understood, and that persons should not be subjected to the indirect and deluding action of the old law of conspiracy." Under the Act of 1875 a strike, even if it involves a breach of contract, is not criminal unless it is attended by other acts which are criminal per se.

I desire again to refer to Gibson v. Lawson, decided by the Court of Appeal of England in 1891, not that it is necessary for the purposes of this opinion, but because I think the interpretation put upon it by Mr. Justice Metcalfe may have occasioned confusion or have prevented the jury from understanding the law, even though I am not prepared to say that in itself it amounts to misdirection necessitating a new trial. It is His Lordship's view that it was decided in that case that if acts are done in contemplation or furtherance of a trade dispute then though they were criminal at Common Law, they have been made lawful by the Act of 1875. With respect it is submitted that the case does not indicate any such view. The ground of the decision is pointed out in Archbold (25th ed.) 1223, rather than at p. 1355 referred to by His Lordship. It is that as strikes are now lawful, the mere threat to do a lawful act cannot amount to intimidation. If the threat amounts to intimidation within S. 7 of the Act, the consequences provided for in that

section necessarily would follow. The question before their Lordships in that case was, did the threat in question in that action remain indictable as a Common Law offence. Their Lordships held that it did not. To hold that the very same acts which are expressly legalized by Statute remain nevertheless crimes punishable by the common law is in their Lordships' opinion contrary to good sense and elementary principle. "It seems to us that the law concerning combinations in reference to trade disputes is contained in 38 & 39 Vict. C. 86, and in the Statutes referred to in it, and that acts which are not indictable under that Statute are not now, if indeed they ever were, indictable at Common Law." Surely this is so. Chief Justice Coleridge observes that Reg. v. Druitt, (1867) 10 Cox C.C. 592, and Reg. v. Bunn, (1872) 12 Cox C.C. 316, are both said to have held that the Statutes (of 1871) have in no way interfered with or altered the common law, and that strikes and combinations expressly legalized by statute may yet be treated as indictable conspiracies at common law. In this view the Court of Appeal cannot agree. They consider the views expressed in those cases as dicta, which cannot be followed. If they were the law, they would render the statutes passed on the subjects inoperative. They also point out that those cases have been criticised by Mr. Justice Wright in his work on Criminal Conspiracies. Fletcher Moulton, L. J., in Gozney v. Bristol Trade and Provident Society (1909) 1 K.B. 924, states that S. 3 of the Act of 1875 renders agreements to strike lawful, because it removes the only ground on which they could be held unlawful. Passages extracted by me from the judgment in Gibson v. Lawson are quoted in Cohen on Trade Union Law (3rd ed.) 155, as a statement of the law. Mr. Cohen is an authority above all others on the subject of Trade Unions and the law of civil and criminal conspiracy. He was one of the members of the Royal Commission in England, appointed in 1903, to consider the law relating to trade disputes and trade combinations. Its report in 1906 was accompanied by a memorandum prepared by him on the "Civil Action of Conspiracy." The learning displayed in it put an end to much mischievous dicta contained in the case of Allen v. Flood (1898) A.C. 1, and Quinn v. Leathem (1901) A.C. 495. His views were approved by the Commission and incorporated in The Trade Disputes Act, 1906, which was founded on the Commission's report. It is here convenient to refer to Section 1 of that

Act, which it will be noticed, however, deals with civil liability. It is as follows:—

"The following paragraph shall be added as a new paragraph after the first paragraph of section 3 of the Conspiracy and Protection of Property Act, 1875:—

'An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.' "

This section brought to an end so far as trade disputes are concerned, the doctrine persistently maintained by Lord Halsbury and more or less countenanced by other members of the House of Lords that conspiracy is a distinct civil cause of action. The doctrine was absolutely unsound. A conspiracy to commit an indictable offence or an act amounting in itself to a criminal wrong is a cause of action. But if an act is not actionable or indictable if done by a person alone it does not become civilly actionable if done by him in concert with others.

In my opinion Mr. Justice Metcalfe erred in his understanding of the English Statutes of 1871 and 1875, when he gave effect to the dicta in Reg. v. Druitt and Reg. v. Bunn. This, however, would not be material unless the same error was carried into his interpretation of the provisions of the Canadian Criminal Code bearing upon the subjects before him. I have made this examination of English Common Law for the purpose of ascertaining whether under it apart from English Statutes a strike is unlawful or whether its legality is based on legislation. A study of the common law was also necessary for a proper understanding of Sections of our Criminal Code to which I will shortly refer. It will also be understood that I am seeking to find first principles for testing the principal matter with which my opinion is concerned, namely, the legality of a sympathetic strike, both at common law and under the Code.

It is clear that strikes are lawful at Common Law if they are for a lawful purpose and are not carried on by unlawful means. See Cotter v. Osborne, 18 M.R. 471. Lord

Haldane once said that he could not tell a Secretary of a Labor Union how to carry on a lawful strike. It depends on the motive and mode of concerted cessation of labor: Russell v. Amalgamated Society of Carpenters and Joiners (1912) A.C. 435, per Lord Shaw of Dumferline. A popular error is that because a strike occasions harm and loss to employers as well as suffering and hardship to the community it becomes unlawful. This is not the law. If the purpose of the strike is to further the legitimate interests of the workmen, and has not as its primary object the infliction of wrongful harm on others, it is legal, and can only become illegal or criminal if unlawful means are used in carrying it on. The stipulation made by me that there should be a lawful object would not even be necessary except to meet the presumption of an intention to inflict harm or injury to others that would arise if a lawful object did not exist. The essence of liability both criminal and civil where harm is occasioned by the act of another or of several acting in agreement is that the primary and immediate object of the act was to inflict such harm rather than to exercise lawful rights. There must have been an intention to cause harm for harm's sake. The question of the intention is always one to be determined on the facts by the jury. The charge of Wills, J., in Thomas v. Amalgamated Society of Carpenters and Joiners, tried at Manchester Assizes, as reported in the Times, April 28, 1902, left it to the jury to say whether Defendants, a labor union, in connection with its conduct had acted vindictively or for the purpose of furthering their own interests. For the purpose of avoiding a statement that to the lay mind might seem disputable I have said the primary object of workmen in striking must be to advance their own interests. I do not wish thereby to have it understood that in law a strike will lose its lawful character because there may be ill-will towards their employer or outside persons if the facts, nevertheless, despite this ill-will show that the primary object of the workmen was a lawful one. See Mogul Steamship Co. v. McGregor, (1892), A.C. 25; Quinn v. Leathem (1901) A.C. 495. To determine the intent of a strike the jury will consider all the circumstances attending the initiation and the prosecution of the strike, and will also have regard to whether the methods used are so disproportionate to the object in view, as to justify the conclusion that the intention was criminal rather than the advancement of the interests of the workmen. If the conduct of the strike is peaceable the

jury will be entitled to infer that the intent was not criminal, even though widespread inconvenience was caused in the community. To enable a jury to intelligently make a finding upon the issue, not only must all the facts connected with the matter be placed in evidence, but the fullest latitude must be allowed for explanation. For that purpose occurrences during the strike, such as efforts to bring about a settlement, are in my judgment clearly admissible. In Mogul Steamship Co. v. McGregor, 23 Q.B.D. 61, Lord Bowen used the following expressions with reference to a justification for the combination there in question. "Such legal justification would not exist where the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell." How wide the door should be open for justification is seen in the judgment of Lord Esher in Temperton v. Russell (1893), 1 Q.B. 715, where he says: "These Trade Unions appear to have agreed together that certain rules, which they **thought** to be for their benefit, should be observed by the Masterbuilders of Hull," and "The Trade Unions seem to have come to the **conclusion** that a certain mode of carrying on building operations was detrimental to their interests or those of their constituents." The preceding discussion of the elements of a lawful strike is based on the Common Law. Certain provisions of the Canadian Criminal Code must be considered as well. By section 590, it is provided that "No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by Statute." This language closely resembles, but is wider than section three of the English Conspiracy and Protection of Property Act, 1875. It is wider than section 2 of the English Trade Union Act, 1871. Section 2 of the latter Act is found in section 497, of the Code. It provides that the purposes of a trade union are not by reason merely that they are in restraint of trade, unlawful. Both sections 2 and 3 of the Trade Union Act, 1871, are in section 32 of The Canadian Trade Unions Act, C. 125, R.S.C. 1906. By it it is enacted that "the purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to

render void or voidable any agreement or trust." The Canadian Trade Unions Act does not apply to any trade union not registered under the Act: Section 5. It is not necessary to express an opinion whether section 497 of the Code would apply to an unregistered trade union. The Common Law which I have already considered left workmen free to make agreements in restraint of trade. Important sections of the Code both for their general application and their bearing on the charge of Mr. Justice Metcalfe are sections 498 and 499, (a). Section 498 enacts that "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any rail way, steamship, steamboat or transportation company:—

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or,

(b) to restrain or injure trade or commerce in relation to any such article or commodity; or,

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees."

Section 499 (a) provides: "Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a penalty not

exceeding one hundred dollars or to three months' imprisonment, with or without hard labor, who,—

> "(a) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury."

I desire to point out in passing that the acts referred to in section 498 cannot be invoked as against workmen if they occur as an incident to a strike otherwise lawful and are not due to a conspiracy to bring them about. It may also not be improper to observe that a violation of these sections does not establish the crime of seditious conspiracy. Their violation may affect the legality of a strike.

I proceed to consider whether a sympathetic strike is lawful. The expression is one that is loosely used. Its correct application would appear to be that given to it in the report of the British Royal Commission on Trade Disputes, 1906, which invented the term "sympathetic" or "secondary" strikes to denote strikes against a customer of or a person dealing with (e.g., as a manufacturer) an employer whose workmen have struck, as a means of reducing the latter employer to submission. A further obvious and common use of it is where a trade organization being out on strike, another organization strikes in sympathy for the purpose of bringing pressure to bear either on its own employers or the employers of the first organization to bring about a settlement favorable to its demands. The Commission recommended Legislation providing among other matters (1) that strikes for whatever motive or for whatever purpose, including sympathetic or secondary strikes, apart from crime or breach of contract, legal; (2) that the Act of 1875 having provided that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime, the provisions should be extended to civil actions and made to apply to sympathetic or secondary strikes as well as others. The Commissioners point out

in their report that the legislation proposed is not understood by them to change the law, but to free the subject from doubts. The Trade Disputes Act, 1906, is based upon this report. By Section 3 sympathetic strikes are legalized so far as civil liability is concerned. I have already quoted it. S.5 (3) of the Act, is as follows:—

"In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labor, of any person, and the expression 'workmen' means all persons employed in trade or industry, **whether or not in the employment of the employer with whom a trade dispute arises; and in section three of the last mentioned Act, the words 'between employers and workmen,' shall be repealed.**

Cohen, 127, says the words italicised in the above subsection were inserted and others in Section 3 of the 1875 Act omitted in view of such cases of "sympathetic" or "secondary" or sub-strikes as in Lyons v. Wilkins, (1896) 1 Ch. 811; (1899) 1 Ch. 255, and Quinn v. Leathem (1901) A.C. 495." Those cases put a limited meaning on the words "trade dispute" in section 3 of the Act of 1875. The words "trade combination" in section 590 of the Criminal Code are defined in section 2 of the Code as follows: "Trade combination" means any combination between masters and workmen or **other persons** for regulating or altering the relations between **any persons** being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service." The combination in my view may be one between workmen not in a common employment. I am not aware of any decision covering the matter. Section 590 is therefore very wide. It may be wide enough to legalize a sympathetic strike, which would only be unlawful if the condition mentioned in the proviso in it was present. I do not, however, think that the lawfulness of a sympathetic strike exclusively depends upon the section. I think its legality is also upheld at Common Law, unless it cannot be brought within the definition of a lawful strike at Common Law. In Conway v. Wade (1909) A.C. 511, Lord Chancellor Loreburn says:—"And inasmuch as industrial warfare unhappily

takes too often the form of strikes and lock-outs, and inducing other persons to co-operate in them, uncertainty as to the weapons allowed by the law is likely to cause more alarm than perhaps may be justified. Certainly some dicta in recent cases give rise to an apprehension that it might be held unlawful for men to induce others to join them in a strike, especially in what is called a secondary strike; for the essence of a strike consists in inducing others not to serve particular employers, or, as the case may be, any employers in a particular trade. I believe that, stated quite generally, was the state of the law preceding the Trade Disputes Act of 1906, so far as it was settled, and that the uncertainties were as I have described." See also report of the British Royal Commission on Trade Disputes in which it is pointed out that such strikes are lawful. The test of the legality of a sympathetic strike in the view of some American authorities is whether those striking in sympathy have an interest affecting themselves in the outcome of the strike. In Pickett v. Walsh, 192 Mass. 572, Loring, J., says: "Organized labors' right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute." In that case the action was not by the employer, but was by certain laborers whose business and right to earn a livelihood were being interfered with by the acts of certain labor unions causing their discharge by whomsoever employed, by threatening the employers with pecuniary loss unless the discharge of the laborers in question was complied with. The Court held, not that the object sought was unlawful, but that the means used, even if they were to gain a lawful object, were unlawful. See 17 L.R.A. (N.S.) 164.

I concede that at Common Law a sympathetic strike may be unlawful if its purpose and not merely its effect is to injure an employer or third person. The concession, however, does not explain such American cases as Toledo, Ann Arbor & Northern Michigan Railway Co. v. Pennsylvania Co. (1893) 54 Fed. Rep. 730; Thomas v. Cincinnati Pacific Railway Co., 62 Fed. Rep. 803; and Arthur v. Oakes (1894), 63 Fed. Rep. 360.

In the first of these cases, which was heard by Mr. Justice Taft (later President of the United States) there was a strike of locomotive engineers on the plaintiffs' railroad and a sympathetic strike on the defendants' railroad.

The engineers on the latter road were refusing to handle the cars of the former railroad, and in a suit brought under the Interstate Commerce Law to compel the latter railroad to handle the cars of the former, Mr. Justice Taft refused to include in the injunction an order restraining the engineers of the defendants' road from quitting their employment, because you cannot compel by mandatory injunction the performance of personal service. But he took pains to discuss the subject at large and to say that, if the men quit the service in execution of a rule of the union that they would not handle cars of a connecting road where there was a strike, in order to procure or compel **the Defendant company to injure the plaintiff company,** they would be liable in damages to the plaintiff company and might be liable criminally. Answering the argument on the other side Mr. Justice Taft says: "But it is said that it cannot be unlawful for an employee either to threaten to quit, or actually to quit the service, when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor where he will. Generally speaking this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it, or agreeing to bestow it for the purpose of inducing, procuring or compelling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it, or refusal to do so, is itself unlawful." I do not agree with Mr. Justice Taft's description of the act in question as "unlawful." In my opinion his views are not sound in principle and are not in accordance with English authority. The true principle frequently referred to in this opinion, is that which is summed up in 27 Halsbury's Laws of England, p. 639: "A combination in restraint of trade is not a criminal offence at common law, unless it is a combination in pursuit of a malicious purpose to ruin or injure a person, as opposed to a combination for the purpose of a legitimate trade object." Under the provisions of the Canadian Criminal Code, no criminality attaches to an act done or caused to be done for the purpose of a trade combination, unless such act is an offence punishable by statute, (i.e.) if

the act is an offence at common law alone it is not indictable. Farwell, L. J., in Russell v. Amalgamated Society of Carpenters and Joiners (1910) 1 K.B. 522, speaking of labor unions covered by the English Trade Unions Act concedes their liberty to be very wide. He says: "Admitting that it is not to be assumed that an unlawful strike is intended in the sense of a strike involving criminal or wrongful acts, there is no such assumption in regard to a strike which is in restraint of trade; the very object of a trade union on its militant side is to obtain its ends by restraining trade, and as this has been rendered lawful by the Trade Union Acts, there is no reason for assuming that this is not its real object and purpose. These rules (rules of defendant union) undoubtedly enable such restraint to be applied; thus, the executive body may call out the men on strike for any or no reason, for their good or to their detriment, and regardless of the public welfare. Such strikes may not merely restrain, but may destroy trade, as has been the case with the shipbuilding industry on the Thames." His Lordship is not thereby stating that a strike may be called for a criminal purpose. In the Ontario case of R. v. Gibson (1889) 16 O.R. 704, it was held under the provisions of the statute then in force (S. 590 of the Code), that it was a misdemeanor and not an act done for the mere purposes of their trade combination where members of a trade union conspired together to injure a non-unionist workman by depriving him of his employment. The statement of Lord Justice Farwell, however, is authority for the view that under S. 590 the motive for calling a strike is immaterial; that it may be for any or no reason, and regardless of the public welfare; provided that what is done or caused to be done is not an offence punishable by statute. The words of S. 590, "for doing or causing any act to be done for the purpose of a trade combination" as already mentioned are susceptible of an extremely wide construction, and are much wider as I have already suggested than the words "trade dispute," etc., in S. 3 of the English Act of 1875. See Quinn v. Leathem, (1901) A.C. 495, where it was held that where a union called out the men of L., an employer, because he employed non-union men, thereby causing a breach of contract by one of the men so employed, and further threatened to call out the men employed by M., a customer of L., unless he withdrew his custom, thereby causing him to withdraw his custom, but without breach of contract, these acts were not done in "contemplation or furtherance

of a trade dispute between employers and workmen," because L. had no quarrel with his men and there was no trade dispute in the case of M. Lord Lindley, at p. 541, of the case says: "I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section (S. 3 of Conspiracy and Protection of Property Act, 1875) even on an indictment for conspiracy." The principle it was feared this decision enunciated (see Conway v. Wade (1909) A.C. 511), was overcome by the Trade Disputes Act, 1906, S. 5 (3), and is in my opinion also met by S. 590 of the Code.

I am therefore of opinion that the law for the purpose of determining the legality of a sympathetic strike may be stated to be as follows: (1) At common law there is no criminality unless there is a conspiracy to do a wrongful act, and that such act, if lawful, if done by one person, is not made criminal if done by several in agreement; (2) that under the Code there is no criminality unless what takes place is an offence punishable by statute. Apply the above principles to a sympathetic strike. A strike takes place of employees, say of the metal trades, in order to bring about the acceptance by the masters of the principle known as collective bargaining. To assist them, workmen of other trades go on strike, though they have no direct interest in the issue at stake. I cannot see anything criminal in their act, either at common law or under the statute. For what offence punishable by statute could they be indicted? Their action is expressly protected by S. 590 of the criminal Code. Unlawfulness does not arise because loss is occasioned to employers or pressure is thereby brought to bear upon them or because hardship and suffering are inflicted upon the public. To be criminal the action of the strikers would have to be shewn to the satisfaction of a jury to have been for the purpose of committing an offence punishable by statute.

Mr. Justice Metcalfe's address is not only able but is powerfully expressed, and can not have failed to have weighed with the jury. Because of its ability I regret to have to differ from him in any respect. The passage from his charge which I am about to quote would give a jury the quite erroneous impression that a sympathetic strike is

in itself unlawful. At pp. 43 and 44 of his charge he is thus quoted: "Shortly I will come to the distinction of strikes in Canada and strikes in England. But before doing that, I wish to remind you of what it is said a sympathetic strike is. Mr. Russell gave us his idea of a sympathetic strike. He said "When a dispute originates between an employer and his employees, and when the labor organizations see that organization being beat, they come to their assistance by calling a strike to force their employers to bring force to bear upon the original disputants to make settlement." That is Mr. Russell's definition given in the box. I have got it from the reporter (repeats definition). Force, force, force. One thing I like about Russell he is candid. Winning, after he got away from—shall I say a natural hesitance, finally came right out with it. He would bring a general strike on at a time when it would create the most, the very most inconvenience. Robinson took a long time, but I think you can gather from his remarks—they all pretty well agree as to what is the right thing to do from a striker's standpoint of calling out a general strike."

A jury could not fail to conclude from His Lordship's comment that a sympathetic strike of the kind described is unlawful and that the force referred to is of an unlawful character. It could only be unlawful if the strike was called for the primary object of inflicting loss. The force Russell described was not physical or intimidating or molesting force, but moral and coercive pressure brought to bear upon an employer by a strike. It is a consequence that is anticipated and is desired by strikers. In law it does not render the strike criminal or even civilly wrong, if the strike is for the furtherance of the strikers' interests. His Lordship at pp. 59 & 60 makes the following observations: "You will find that the Canadian law is different from the English law. In Canada it never was intended to permit any one or any body of men, under the guise of labor, to combine to do wrong to the community." With respect I must offer three criticisms. One is that there is no difference between the English and the Canadian law in this respect. The second is that a correct understanding of the law by the jury required that it should have been pointed out to them that the infliction of loss or hardship on the community does not render a strike unlawful if the primary and real object of the strike is to advance the interests of

labor. The other is that the statement of His Lordship assumes that the strikers did combine to do wrong to the community. That, of course, is not a matter to be determined by the Court, but is a question of fact for the jury alone. While it is quite within the province of the Judge to indicate the effect of the evidence upon his mind, in order that he may assist the jury, his conclusions preferably should be reached as a result of an adequate and helpful review of the evidence that will enable the jury to come to a different conclusion if they are so disposed. At the outset of this opinion I remarked that His Lordship's charge is based upon a complete conviction of Mr. Russell's guilt. That could not be complained of if the evidence was all one way. It may have been. But if it was not, if the evidence for the defence was such that a jury might reasonably find that the strike was for the purpose of enforcing the principle of collective bargaining, the accused was entitled to have the evidence and the law applicable thereto stated and explained to the Jury in order that no injustice should be done the prisoner by the assumption of guilt made by the learned Judge. I will illustrate this by another passage at pp. 61 and 62. His Lordship is referring to S. 498 of the Code. He says: "Now, unless under our laws it be for their own reasonable protection as a lawful combination of workmen, of which the jury shall be the judge, it is a serious offence to conspire, combine or agree unlawfully to unduly limit facilities for transporting, supplying and storing commodities or to restrain trade." Put in this manner the jury would conclude that the offence had been made out. I come to another passage, which, though open to criticism by reason of the way it is expressed, nevertheless contains argument that is proper and that the defence would have to meet. It is as follows (pp. 63 & 64):

"How can a general sympathetic strike, **the object of which is to tie up all industry,** to make it so inconvenient for others that they will cause force to be brought about, to stop the delivery of food, to call off the bread, to call off the milk, to tie up the wheels of industry, and the wheels of transportation from coast to coast, to lower the water pressure in a City like Winnipeg, which, since the establishment of modern improvements has no other way in which to carry on its life; how can such a strike be carried on successfully without a breach of all these matters, without violence, intimidation, without watching and besetting?

How can you say if you exercised your common sense that those in charge of a strike like that did not intend those things should follow. And gentlemen, all those things followed."

In the words: "How can a general sympathetic strike, **the object of which is to tie up all industry**" His Lordship concludes the whole matter and finds that in law a sympathetic strike is unlawful. It was for the jury to say what the object of the strike was. While it may have had the effect of tying up all industry that was not necessarily its object. Its object may nave been to enforce the demands of the workmen in the metal trades by a form of strike that it may have been expected would have quickly brought the masters to the men's terms. The question was for the jury. For the proper consideration of that question His Lordship would have been quite right in asking the jury whether in view of the consequences that ensued the strike was called to adjust a trade grievance or for the purpose set out in the indictment. Indeed that is the issue tendered in the indictment. There are other passages in the charge of the same nature. At pp. 65 & 66 these words occur: "And be it unlawful that way or be it unlawful any other way so long as it is unlawful, those who take part in an unlawful, general sympathetic strike of that class, can hardly hope to take the benefit of the clauses in the Code which exempt an honest striker, honestly striking in an honest strike, from punishment." I do not fail to notice that His Lordship points out what strikers may lawfully do. Unfortunately the charge is so expressed that it completely excludes the likelihood of the jury considering whether the object of the strike in question was other than seditious or to commit a nuisance. The opportunity to the jury to consider whether the object of the strike was to bring about collective bargaining is made by His Lordship at pp. 75 & 76. 'Collective bargaining.' We were not assisted much with that. If collective bargaining means that thereby the workers of Canada may enforce upon the employer a recognition in the sense in which it is used, of agencies for the purpose of making contracts for their men with their employers; and if such a condition of affairs will make it more easy for those who control or who desire to control labor for unlawful purposes, to tie up industry from coast to coast, to give as much inconvenience to the general public as possible, to make a strike efficient, as has been defined here.

And if that was the intention, gentlemen, of urging and demanding this collective bargaining from the governments, so that a revolution by a strike might be brought about more easily, it was seditious to make these demands in that way. But you will remember in connection with that gentle men, that that might not have been the design. It is for you to say whether or not that was the design." His Lordship is here leaving to the Jury the question whether the demand for collective bargaining was for a seditious purpose or not. That is the principle upon which the whole charge should have proceeded. Unfortunately even in the above passage there is not a scintilla of evidence suggested to the Jury that might even raise a doubt in their mind that the intention was seditious.

My opinion as to the effect of His Lordship's charge upon certain labor rights, particularly as to the legality of the sympathetic strike, would be valueless if I had failed to point out what I consider to be misdirection and which in my judgment renders it impossible to regard the findings of the jury as a pronouncement upon the question. It will be understood that in saying this I am expressing no view whatever upon the evidence in the case or upon the merits or accuracy of His Lordship's charge in its relation to the law of seditious conspiracy.

Each of the seven counts in the indictment sets up as an ingredient in the offence charged, that the strike involved a violation by the strikers of the Industrial Disputes Investigation Act, 1907. Section 56 of this Act provides that it shall not be lawful for any employer to declare or cause a lockout, or for any employee to go on strike on account of any dispute prior to or during the reference of such dispute to a board of conciliation and investigation under the provisions of the Act. A violation of the Act in this respect is punishable by a fine of not less than ten dollars and not more than fifty dollars for each day such employee is on strike.

The six counts in the indictment charge seditious conspiracy, while the seventh is for a criminal nuisance. These charges should be established without recourse to setting up a violation of the Industrial Disputes Investigation Act. It would appear to me that the obvious purpose of the draftsman of the indictment, in referring to the Act, was

to set up an offence coming within the proviso in section 590 of the Criminal Code. That section has already been referred to. It provides, "That no prosecution shall be maintainable against any person for conspiracy in refusing to work with or for an employer or workman, or for doing any act, or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute." As a violation of the Industrial Disputes Investigation Act is an offence punishable by statute, the proviso in section 590 is covered. The device was not necessary for the purposes of the Crown, as the crime of seditious conspiracy is not protected by section 590. Unless the Crown was prepared to prosecute the accused for a violation of the Industrial Disputes Investigation Act, I do not think its contravention should have been used for the purpose of establishing the offence of seditious conspiracy. On the other hand, if the strike was lawful under S. 590, I do not think the accused should be deprived of the benefit of the section by setting up against them an infraction of an Act punishable with a fine.

Before closing this opinion attention should be called to the law of picketing contained in section 501 of the Code. The section is taken from section 7 of the English Conspiracy and Protection of Property Act, 1875, with the omission of an important provision. I have already quoted the English section. Section 7, including this important clause was adopted without change by the Canadian Parliament in 1876. See 39 Vict. C. 37, ss. 2 & 3, and Chap 173, R.S.C. (1886). On the codification by Parliament in 1892 of the Criminal law the section was put in its present form by the omission of the following clause: "Attending at or near the house or place where a person resides or works or carries on business or happens to be on the approach to such house or place in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section."

In Great Britain, on the other hand, the law of picketing has been made more favorable to workmen than it was under this clause by the substitution for it of the following section in the Trade Disputes Act, 1906:—"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to

attend at or near a house or place where a person resides or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."

This section was passed, as previously remarked, in consequence of the judgment in Lyons v. Wilkins (1896) 1 Ch. 811, (1899) 1 Ch. 255, in which it was held that acts of watching and besetting proved in that case, although it was admitted that the pickets used no violence or intimidation or threats, were acts in themselves unlawful at common law, as constituting a nuisance of an aggravated character. English public opinion condemned the decision. Mr. Haldane, later Lord Chancellor, and now Viscount Haldane, writing in the Contemporary Review, said: —"It is almost impossible in view of this decision to conduct a strike lawfully. To hold what the Court of Appeal held is to make the protection which the section affords to the workman a mere trap. It may be argued that a strike is a wicked thing, and ought to be illegal in every shape and form. It may with equal force be said that the combination of great shipowners against their weaker rivals to the extent of ruining them was likewise a wicked thing, yet the House of Lords has solemnly declared that this latter course of conduct is not wicked, but is natural and legal on the part of persons carrying on business. One asks why the workman should be in a different position from the capitalists, for it is difficult to distinguish the cases."

Winnipeg, January 17th, 1920.

W. H. TRUEMAN.